KO KO MA PONY HORSE CENTRE

v.

RASA SAYANG BEACH HOTELS (PG.) BHD. (1)

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[SUIT NO. 22-100 OF 1988]
3 JULY 1989

CIVIL PROCEDURE: *Appeal against Senior Assistant Registrar's decision that bill of cost be taxed at conclusion of trial - Interlocutory proceedings - Interpretation of O. 59 r. 4(1) - Meaning of "forthwith" or "in any event" - Interlocutory cost to be taxed forthwith or at the end of proceedings.*

This is an appeal by the plaintiff against the decision of the Penolong Kanan Pendaftaran (PKP) in respect of interlocutory proceedings in this suit be taxed at conclusion of trial.

The plaintiff made a claim (*inter alia*) for a permanent injunction in respect of the defendants premises which was let to him. Simultaneously the plaintiff was granted an interim injunction. An application to set aside the injunction was dismissed by this Court with cost (and later by the Supreme Court).

The plaintiff thereafter filed his appointment of taxation together with his bill of cost to be taxed forthwith. The issue before the Court was whether the plaintiff was entitled to tax his cost of the interlocutory proceedings forthwith or should such an application be disposed with at the end of the suit.

Held:

[1] Order 59 r. 4(1) clearly provides the Court with a discretion to deal with the question of cost at any stage of the proceedings. However, as a general rule, the question of cost should be settled at the end of the action.

[2] An order for an interlocutory cost should only be made payable 'forthwith' or "in any event" when the party against whom the order been made has been guilty of oppressive and unreasonable conduct or the party has taken unnecessary or improper action.

[3] The question of a permanent injunction is yet to be settled where the merits of the whole case will be litigated at the main trail. In the premises, the Court concluded that the cost of the interlocutory application be taxed and paid at the conclusion of the trial.

[Appeal dismissed with costs.]

Cases referred to:
Chow Yong Hong v. Chow See Lim & Anor. [1959] MLJ 23
Adam & Harvey Ltd. v. International Maritime Supplies Co. Ltd. [1967] 1 All ER 533
Allied Collection Agencies Ltd. v. Wood & Anor. [1981] 3 All ER 176
Graham v. Sutton, Carden & Co. [1897] 2 Ch 367

Legislation referred to:
Rules of the Supreme Court [UK], O. 62 r. 4(1)
Rules of the High Court 1980, O. 59 r. 4(1)

Other sources referred to:
Mallal's Supreme Court Practice, at p. 756
White Book, para. 62/4/1
David Beans on Injunction, 3rd Edn., p. 62

For the plaintiff/appellant - Choo Hon Choy; M/s. Tan Beng Hong & Co.
For the defendant/respondent - N.G. Sivanandan with Karin Lim Ai Ching; M/s. Presgrave & Matthews

JUDGMENT

Mohamed Dzaiddin J:
Decision on encl. 70

This is an appeal by the plaintiff against the decision of Penolong Kanan Pendaftar given on 16 March 1989 ordering that the plaintiff's bill of costs in respect of interlocutory proceedings in this suit be taxed at the conclusion of the trial.

What happened in this case was this. On 19 July 1988 the plaintiff issued a writ against the defendant claiming, *inter alia*, for a permanent injunction in respect of the defendant's premises at Batu Ferringhi which was let by the defendant to him. On the same date, the plaintiff filed an application in chambers for an interim injunction which was granted by this Court. Consequently the defendant applied to set aside the said interim injunction. After hearing Counsel, I dismissed the defendant's application, who then proceeded to appeal to the Supreme Court. The said appeal was also dismissed. Thereafter, the plaintiff extracted the High Court order on 11 January 1989. For the purpose of this appeal, the relevant part of the order (as to costs) reads as follows:

> ... And upon encls. 7 and 8 coming up for decision on 5 December 1988 it is ordered that both the applications of the defendant be and hereby **dismissed with costs**. (Emphasis is mine.)

On 13 January 1989 the plaintiff filed his appointment of taxation together with the bill of costs. At the taxation of the bill before the Registrar on 28 February 1989, the defendant opposed the said taxation on the ground that the plaintiff was not entitled to tax his costs of the interlocutory proceedings unless the Judge made an order that such costs be paid forthwith. The Registrar allowed the objection and held that the taxation should be at the end of the suit.

In the appeal before me, Encik Choo, for the plaintiff, submitted that the Registrar was wrong in his decision that the costs be taxed at the conclusion of the trial. He contended that the costs of the interlocutory proceedings should be taxed forthwith under O. 59 r. 4(1) Rules of the High Court. Basically, what the plaintiff was saying was this. Upon reading the aforesaid order, the Court intended or deemed to intend that the plaintiff was entitled to tax his costs immediately. Counsel referred me to the cases cited in *Mallal's Supreme Court Practice*, at p. 756 under para. 59/4/2 and Shankar J's decision in *The East Asiatic Co. (M) Bhd. v. Kilang Papan Aman Sdn. Bhd.* (KL Civil Suit No. 2157/85 (unreported)). Encik Siva, on the other hand, submitted that the general rule that interlocutory proceeding costs be settled at the end of the action should apply here. (See: *Chow Yong Hong v. Chow See Lim & Anor*. [1959] MLJ 23). He stated that in the circumstances of this case the Court did not intend that costs should be taxed and paid forthwith. Counsel also referred me to the statement of claim and the defendant's defence and counterclaim and stated that despite the order of this Court that the case be set down for an early trial the plaintiff seemed not to be in a hurry to expedite the matter. He felt that the plaintiff might not be successful in his claim and in such an event the plaintiff might not be able to pay any costs as he could be impecunious.

Clearly, the powers of the Court in dealing with the question of costs is found in O. 59 r. 4(1) (which is similar to O. 62 r. 4(1) of the English Rules of the Supreme Court). It reads as follows:

> Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

From the above rule, it is clear that the Court may deal with the question of costs at any stage of proceedings or after the conclusion of the proceedings. Secondly, the Court may, if it thinks fit, order the payment of costs to be paid forthwith notwithstanding that the proceedings have not been concluded. The cases of *Adam & Harvey Ltd. v. International Maritime Supplies Co. Ltd.* [1967] 1 All ER 533 and *Allied Collection Agencies Ltd. v. Wood & Anor.* [1981] 3 All ER 176, and the commentary in the 1985 *White Book* para. 62/4/1 would appear to me to lay down the general principle that even if the Court did not make an order for costs to be taxed and paid forthwith, a party to a summons who was awarded costs was entitled to have them taxed and paid forthwith, although the action had not yet been tried. This was followed by Shankar J in the *East Asiatic* (*supra*). On the other hand, the judgment of Smith J in *Chow Yong Hong* (*supra*) was to the effect that as the proceedings being interlocutory, the general rule was that the costs should be settled at the conclusion of the suit.

Therefore, in the circumstances of the whole case, I come to the following conclusion. First, I adopt the decision of Smith J, in *Chow Yong Hong* who held that where the proceedings were purely interlocutory, costs should follow the general rule that it should be settled at the end of the action.

Secondly, an order for an interlocutory costs should only be made payable "forthwith" or "in any event" when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct (*Graham v. Sutton, Carden & Co.* [1897] 2 Ch 367) or the other party has taken unnecessary or improper action (*David Beans on Injunction*, 3rd Edn., p. 62.). Again, according to the same author, the "order for 'plaintiff's costs in any event' is unusual in injunction cases, being more appropriate to summonses where, for example, a defendant seeks an extension of time" (*ibid*). In the instant case, there were valid reasons for the defendant to apply to set aside the *ex parte* injunction and certainly such application could not be said to be frivolous or unreasonable.

Thirdly, in the present case, the plaintiff's claim is for a declaration that the tenancy of the premises is valid and subsisting. In addition, he is claiming for a permanent injunction against the defendant with respect to the said premises, where the merit of the whole case will be litigated at the main trial. In the circumstances, I feel it is proper that the costs of the interlocutory applications be taxed and paid at the conclusion of the trial.

Finally, which I should add in retrospect, I never intended to order that the costs be taxed and paid forthwith at the time when I gave my decision dismissing the defendant's application with costs.

Accordingly, this appeal is dismissed with costs.

Also found at [1989] 1 CLJ 1019